IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 9 OF 2006

Mr. Raimundo Antonio Minguel
Edwin Alfonso, represented by
his attorney Mr. Gabriel Caetan Carvalho. ..... Appellant

V e r s u s

Mr. Paul J. M. D'Silva & anr. ..... Respondents

Mr. R. G. Ramani, Advocate for the Appellant.

Mr. Arun Bras De Sa, Advocate for Respondent no.1.

Mr. S. N. Sardessai, Public Prosecutor for the Respondent no.2.

CORAM:- N. A. BRITTO,J.

DATE:- 16th March, 2006.

P.C.

Heard Shri Ramani, the learned Counsel on behalf of the appellant/Complainant and Shri Arun Bras De Sa, the learned Counsel on behalf of the respondent/accused.

2. This appeal is filed by the Complainant against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881,

vide Judgment/Order dated 04.05.2005 of the learned J.M.F.C., Margao.

3. The complaint was filed through the attorney of the Complainant Mr. Raimundo Antonio Minguel Edwin Alfonso, with the allegation that the accused had given to the Complainant a cheque dated 11.08.2001 for Rs.33,462/-, towards compensation for the damage done by the said accused to the fence of the Complainant, cutting two Bhendi trees belonging to the Complainant and the balance payment due to the Complainant by the accused in respect of a plot purchased by the accused of the property "Goddea Damulem" and that was by Sale Deed dated 10.08.2001. The Complainant through the said attorney, had sent notice to the accused dated 27.08.2001, demanding payment of the amount due on the said cheque. The accused filed a reply to the said notice and had contended that the said property was initially agreed to be purchased for Rs.2,50,000/- but subsequently was purchased for Rs.2,20,000/- as it was found on the basis of the N.O.C. issued by the S.P.D.A., that a space of 4 ½ metres towards the eastern boundary had to be left open for the purpose of widening of the existing P.W.D. road and that the accused had handed over to the Complainant three cheques in the sum of Rs.6,792/-, Rs.2,09,000/- and Rs.33,462/-, the first two dated 10.08.2001 and the third dated

11.08.2001, and had also handed over cash of Rs.4,208/-. It was the case of the accused that the Complainant was to return the said cheque of Rs.33,462/- bearing no. 0692439 dated 11.08.2001, but to his dismay, he had found that the Complainant had presented the said cheque to the Bank for collection behind his back and contrary to what was agreed between the accused and the Complainant. It appears that the Complainant ordinarily resides at Middlesex, England, and for that reason, the Complaint came to be filed through the Complainant's said attorney.

4. The learned J.M.F.C., by his Order dated 04.05.2005, in acquitting the accused under Section 138 of the Negotiable Instrument Act, 1881, inter alia, observed that the Complainant's attorney had stated that he did not know what were the individual amounts to be paid by the accused towards the fence, cutting of two Bhendi trees and towards balance payment in respect of the plot purchased by the accused and, therefore, it appeared that the Complainant's attorney was not conversant with the facts as set out in the complaint and was unable to explain the details towards the alleged sums of money that the Complainant had claimed from the accused as liability in respect of the said cheque. The learned J.M.F.C. also observed that the Complainant's attorney, in his cross examination, was not

aware and could not answer the various questions put to him pertaining to the transaction between the Complainant and the accused as he was not aware of the same and that it was incumbent upon the Complainant to have deposed to the facts of the case and to have remained present for cross examination as regards the facts, which the Complainant had knowledge. The learned J.M.F.C. also observed that the accused had placed on record ample material pertaining to the transaction including the documents in support of the case of the accused by way of rebutting the presumption in favour of the Complainant.

5. Shri Ramani, the learned Counsel on behalf of the Complainant has submitted that in terms of Section 139 of the Negotiable Instruments Act, 1881, there was a presumption in favour of the Complainant that the cheque was issued by the accused towards a subsisting debt and unless the accused had stepped into the witness box to displace the said presumption, the accused could not have been acquitted. Shri Bras De Sa, the learned Counsel on behalf of the the accused has submitted that the Complainant's attorney was not at all conversant with the facts of the case and the conclusion arrived at by the learned J.M.F.C., by acquitting the accused could not be termed as perverse. In other words, it is the contention of Shri

Bras De Sa, that considering the facts as deposed to by the Complainant's attorney, the view held by the learned J.M.F.C., is quite a probable view and, therefore, need not be interfered with by this Court.

6. Although that attorney of the Complainant admitted that the accused had replied to the notice sent on behalf of the Complainant, the Complainant did not produce the notice in his evidence before the Court. The accused also did not enter into the witness box in support of all that he had stated in the said reply given by him to the Complainant's statutory notice. Nevertheless, the accused along with statement recorded under Section 313 of the Code produced several documents including R.C.S. no. 46/1997, which was filed by the accused and his wife against the Complainant and a copy of the Sale Deed dated 10.08.2001, executed between the Complainant and his wife and the accused and his wife. In the said Sale Deed, there is a clear admission to the effect that the Complainant had received a sum of Rs. 2,20,000/- pursuant to the agreement and by way of consideration for execution of the said Sale Deed. The case of the Complainant, as already set out, was that the amount of the cheque of Rs.33,462/- given by the accused to the Complainant was on account of damage done by the accused to the fence, cutting of two Bhendi trees and

part payment of the sale price. However, when the Complainant's attorney was questioned on this aspect, the Complainant's attorney stated that he did not know what were the amounts due towards the fence, the cutting of trees or balance payment in respect of the plot purchased. In case the Complainant had admitted that he had received the entire consideration of the Sale Deed in the said Sale Deed, then the case of the Complainant's attorney that the said cheque was issued towards the payment due on account of damage to the fence, cutting of Bhendi trees and balance payment of the sale price, would not be free from doubt. The attorney when questioned about the payment of cash of Rs.4,208/- towards the sale price, stated that he did not know about the same. He also stated that he did not know whether the property ordinarily was agreed to be sold by the Complainant for a total price of Rs. 2,50,000/-, and likewise, that he did not know whether because of the N.O.C. issued by the S.G.P.D.A., the sale price was reduced from 2,50,000/- to Rs. 2,20,000/-. He admitted that the Complainant and his wife had acknowledged the receipt of Rs. 2,20,000/-, from the accused. The issuance of the cheque by the accused to the Complainant was intrinsically connected with a previous dispute between the Complainant and the accused, which had resulted in filing the Civil Suit and, thereafter, the sale of the property. It is contended on behalf of the

Complainant, if the Sale Deed was made on 10.08.2001, the accused would not have issued a cheque dated 11.08.2001. The Complainant's attorney himself has not stated as to when exactly the said cheque dated 11.08.2001, was handed over to the Complainant. The admission by the Complainant in the Sale Deed that he had received entire price of the property sold, coupled with the inability of the attorney to depose as regards material aspects of the transaction between the Complainant and the accused leading to giving the suit cheque, was sufficient to displace the presumption that the cheque was issued for balance payment of sale price.

7. In my view, there is no merit in this appeal, consequently, the same is dismissed.

N. A. BRITTO, J.

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